LIBRARY
SUPREME COURT, U.S.

71-3851

SUPREME COURT, U.S.
SEP 16 1971
E. ROBERT SEAVER, CLERK

# Supreme Court of the United States

October Term, 1971

No.

PRINTING SPECIALTIES & PAPER PRODUCTS UNION NO. 447, INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

*Petitioner,*

vs.

PRIDE PAPERS-AARONSON BROS. PAPER CORPORATION, PRIDE PAPERS, DIVISION OF AARONSON BROS. PAPER CORPORATION, AARONSON BROS. PAPER CORPORATION, ROTTMAN PAPER CO., INC., AND TERMINAL PAPER CONVERTING, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN S. McLELLAN
421 E. Market Street
Kingsport, Tennessee 37660
FRANK SOBIN
401 Broadway
New York, New York
DONALD M. MURTHA
ANTHONY F. CAVANAGH
1828 L Street, N.W.—Suite 703
Washington, D. C. 20036
*Attorneys for Petitioner*

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| QUESTION PRESENTED | 2 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT: | |
| 1. The Court Below Has Decided An Important Question Of Federal Labor Law In A Way Which Is In Conflict With Applicable Decisions Of This Court | 7 |
| A. Wiley And The N.L.R.B. | 7 |
| B. Wiley Under Section 301 And The Competing Union | 13 |
| C. Burns And H. K. Porter | 17 |
| D. The Decision Of The Court Of Appeals Is In Conflict With Compatible State Law | 19 |
| 2. The Decision Below Would Appear To Be In Conflict With Decisions Of Other Courts Of Appeal On The Same Issue | 20 |
| 3. The Court Of Appeals Has Decided An Important Question Of Federal Law Which Should Be Settled By This Court | 21 |

*Page*

CONCLUSION ..... 23

APPENDIX "A"—Opinion of the Court of Appeals for the Second Circuit ..... 1a

APPENDIX "B"—Opinion of the District Court ..... 7a

STATUTES:

28 U.S.C. 1254(1) ..... 1

§ 301, Labor-Management Relations Act, 1947 ..... 2, 7, 13

§ 301, Labor-Management Relations Act, 1947 (29 U.S.C. 185) ..... 2

§ 301, Labor-Management Relations Act, 29 U.S.C. 185(a) ..... 2, 19

Labor-Management Relations Act ..... 9

National Labor Relations Act, § 8(a)(5) ..... 8

CASES:

Associated General Contractors, 182 N.L.R.B. No. 29, 74 L.R.R.M. 1050 ..... 15

Burns International Detective Agency, Inc., 182 N.L.R.B. No. 50 ..... 8, 10

*Burns International Detective Agency* v. *N.L.R.B.*, 441 F.2d 911 ..... 9, 17, 19, 21

*Page*

*Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 506 ..... 19, 20

Hackney Iron & Steel, 167 N.L.R.B. No. 84 ..... 8

Hackney Iron & Steel Co., 182 N.L.R.B. No. 53 ..... 8, 10

Hayes Express, Inc., 134 N.L.R.B. 408, 49 L.R.R.M. 1176 (1961) ..... 15

*Hoche Productions, S.A.* v. *Jayark Films Corp.* (D.C. N.Y.), 256 Fed. Supp. 291) ..... 20

*International Chemical Workers Union* v. *N.L.R.B.*, 395 F.2d 639 ..... 8

Kota Div. of Dura Corp., 182 N.L.R.B. No. 51 ..... 9, 10

*McGuire* v. *Humble Oil & Refining*, 355 F.2d 352 .... 13, 14

*N.L.R.B.* v. *John J. Corbett Press*, 401 F.2d 673 (1968) ..... 15

*H. K. Porter* v. *N.L.R.B.*, 397 U.S. 99 ..... 18, 19

*Ranch-Way, Inc.* v. *N.L.R.B.*, 77 L.R.R.M. 2689....13, 19, 20

*Textile Workers* v. *Lincoln Mills*, 333 U.S. 448 ..... 19, 20

Travelodge Corp., 182 N.L.R.B. No. 52 ..... 9, 10

*United Steelworkers* v. *N.L.R.B.*, 389 F.2d 295, 298.... 18

*United Steelworkers of America* v. *Reliance Universal, Inc.*, 335 F.2d 891 ..... 12, 13

*Page*

Valleydale Packers, Inc., 162 N.L.R.B. 1486 ..... 8

*Wackenhut Corp. v. United Plant Guards,* 332 F.2d 954 ..... 12, 13

*Wdeg v. Livingston,* 376 U.S. 543 ..... 7, 8, 9, 11, 12, 13, 14, 15, 16, 21

MISCELLANEOUS:

General Counsel Report on Case-Handling Developments, 58 L.R.R.M. 54, 58 ..... 8

Business Corp. Law of State of New York (McKinney's, 1963), § 906 ..... 20

# Supreme Court of the United States

**October Term, 1971**

**No.**

PRINTING SPECIALTIES & PAPER PRODUCTS UNION NO. 447, INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

*Petitioner,*

vs.

PRIDE PAPERS-AARONSON BROS. PAPER CORPORATION, PRIDE PAPERS, DIVISION OF AARONSON BROS. PAPER CORPORATION, AARONSON BROS. PAPER CORPORATION, ROITMAN PAPER CO., INC., AND TERMINAL PAPER CONVERTING, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitoner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on June 15, 1971.

### OPINIONS BELOW

The opinion of the Court of Appeals is reported at —— F.2d —— and is reproduced as Appendix "A" hereto. The opinion of the District Court is reproduced as Appendix "B" hereto.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a multi-employer collective bargaining contract to which petitioner and respondents Roitman Paper Co., Inc. and Terminal Paper Converting, Inc. were parties survived the reorganization merger and consolidation by such contracting employers with another employer engaged in the same industry, which consolidation was accomplished under a consolidation agreement specifically providing for the assumption of petitioner's collective bargaining agreement by the consolidated company.

## STATUTE INVOLVED

Section 301 of the Labor-Management Relations Act 1947 (29 U.S.C. 185) provides in relevant part as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

## STATEMENT OF THE CASE

This action was instituted by the petitioner in the United States District Court for the Southern District of New York to obtain declaratory, injunctive and monetary relief under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, for breaches by respondents of a collective bargaining agreement between petitioner and the respondents Roitman Paper Company, Inc. and its wholly owned subsidiary, Terminal Paper Converting, Inc.

Roitman and its wholly owned subsidiary, Terminal, were members of an Industry Association which bargained on an Association basis with petitioner[1] (48-a). Such Association was known as the Paper Merchants Association of New York which had for many years executed multi-employer collective bargaining agreements with petitioner.

In December, 1961, the Industry Association and petitioner executed a collective bargaining agreement which operated to modify prior agreements covering the warehousing, processing, and converting employees of the 43 Industry Association members, including Roitman-Terminal, as parties to the multi-employer industry group and on September 1, 1964 agreed to certain modifications and extensions of the foregoing contract to August 31, 1967. Such agreements set forth uniform wage rates, overtime rates, paid holidays, vacations, pensions, health and welfare programs and working conditions along with other terms and conditions of employment including a no-strike provision applicable to all employees contemplated by the Industry Association-wide bargaining contract, which contract embraced all employees in the job classification stipulated in the contract employed by the respondent, Roitman-Terminal (201-a).

On December 23, 1964, Roitman-Terminal entered into a reorganization, merger and consolidation agreement with respondent Aaronson Bros. Paper Corporation, which firm was "engaged in a similar line of work."[2] Under the terms of the reorganization agreement the following provisions and considerations are material:

---

[1] "a" refers to the Joint Appendix filed in the Court of Appeals.

[2] Opinion below, Appendix "A", page 2a to 3a R.T.

1. Roitman-Terminal was solely owned by Max Roitman who became Executive Vice President and Secretary of the reorganized corporation with a 50% stock interest.

2. Aaronson Bros. and its ownership had a 50% stock interest in the reorganized corporation.

3. Roitman-Terminal employed seven employees who were covered by petitioner's labor agreement.

4. Aaronson had 26 employees who remained with the reorganized company and who were represented by Local 210, International Brotherhood of Teamsters.

5. The reorganization agreement recognized the contractual obligation of Roitman-Terminal and the reorganized enterprise, Pride Papers, Aaronson Brothers Paper Corporation (hereinafter referred to as "PPA."), to petitioner and provided, *inter alia*, that: "All obligations, present and future, under a contract or contracts between Roitman-Terminal and the labor union (i.e., petitioner Local 447) presently representing the employees of Roitman and Terminal" (69-a) were assumed and respondents agreed to be responsible for and perform all actual and contingent liabilities, obligations, contracts and commitments in respect to or derivative of, the contract between petitioner and Roitman-Terminal.

Negotiations between petitioner and Roitman-Terminal with respect to petitioner's contract rights as they related to petitioner's members failed to produce an accord, and on December 24, 1964, Roitman advised its employees: "This is to inform you that this company will cease its production operations effective December 24, 1964. Your services will no longer be needed after January 8, 1965. This is to be

deemed noticed in accordance with collective bargaining agreement between this company and your union" (223-a). The reorganized enterprise then continued in production in disregard of the terms of petitioner's labor agreement.

While the reorganized enterprise paid on behalf of former Roitman-Terminal employees to the plaintiff union sums due *for the various funds* such as pension and health and welfare funds provided in the collective bargaining agreement between petitioner and Roitman-Terminal, the reorganized enterprise declined to honor the remainder of the contract including the higher wage rates provided therein; the working conditions provided, including the wage-hour overtime, and other conditions of employment stipulated in the contract. And finally the reorganized enterprise assumed the position that it could properly unilaterally terminate its contract with petitioner during its term. Petitioner's suit in the United States District Court followed.

The District Court (Tyler, D. J.) sitting without a jury dismissed the complaint. The District Court reasoned:

1. That neither the contract between petitioner and respondents, including the duty to arbitrate, survived "this transaction" (referring to the reorganization).[3] Because of the fact that Teamsters Local 210 was the bargaining agent for all employees at Aaronson, the Court concluded that if PPA (the reorganized enterprise) were required even to arbitrate petitioner's claims it would be charged with committing an unfair labor practice (Appendix "B", page 14a).

2. The Court reached this conclusion despite the fact that

[3] Appendix "B", page 11a.

petitioner's agreement was a multi-employer association contract and that, "The successor corporation is engaged in essentially the same type of business as the predecessor."

3. The District Court concluded that the fact that none of the former Roitman-Terminal employees went to work for the reorganized enterprise suggested "from the standpoint of former employees" the lack of substantial continuity of identity.[4] Thus, on the theory that the presence of Teamsters Local 210 at the reorganized enterprise made "impractical" and "inequitable" the enforcement of petitioner's multi-employer labor contract, the District Court concluded that the complaint should be dismissed.

Upon appeal, the Court below affirmed the District Court, concluding that PPA was not a successor employer because: (a) There was a lack of continuity in the business operation since the reorganized enterprise refused employment to former Roitman-Terminal employees; (b) Even if PPA were a successor to Roitman-Terminal the only obligation that would have been imposed by the courts on the successor employer was the obligation to arbitrate; and (c) The existence of Teamsters Local 210 at the reorganized enterprise was alone sufficient to warrant the conclusion that the reorganized enterprise was not a successor employer to Roitman-Terminal even for the purpose of compelling arbitration.

---

[4] This conclusion would appear to be of mere peripheral concern to the basic problem posed by this law suit—that is, whether or not petitioner's uncontested contract rights specifically protected in the consolidation agreement survived the reorganization. For certainly petitioner's members' employment rights and working conditions were dependent upon the survivorship of such collective bargaining contract.

## REASONS FOR GRANTING THE WRIT

1. *The Court Below Has Decided An Important Question Of Federal Labor Law In A Way Which Is In Conflict With Applicable Decisions Of This Court.*

This Court in 1964 decided *Wiley* v. *Livingstone*, 376 U.S. 543. This holding was double-fused. Questions relating to procedural arbitrability are for the arbitrator—not the courts; a successor not a party to or voluntary assumer of the predecessor's labor contract [5] may be compelled to arbitrate under that contract.

While the procedural arbitrability aspect of *Wiley* has been put to rest, the contract survival issue remains provocative in the two-pronged search for a judicial resolution of the labor law obligations of a successor employer in the context of precisely the industrial reorganization and consolidation here involved. Since this Court's decision in *Wiley*, two principal courses of litigation have ensued. One path chosen was under Section 301 in the courts for breach of contract, as is the case here. And the other in N.L.R.B. proceedings to enforce various obligations upon the successor, including the hiring of terminated employees; the remedying of unfair labor practices; recognition of the predecessor's union; limitations on the right to take unilateral action and, in certain circumstances, the assumption of the predecessor's contract.

A. *Wiley And The N.L.R.B.*

Shortly after the *Wiley* decision, the N.L.R.B. general counsel issued a statement to the effect that in view of the

---

[5] Here the successor did voluntarily assume Roitman-Terminal's labor contract with petitioner.

law evolving under the *Wiley* case and "in the interest of consistent interpretation and development of collective bargaining concepts under federal labor law" the general counsel intended to submit the question of contract survival in successorship cases to the Board.[6] Accordingly, complaints were issued charging violations of Section 8(a)(5) of the N.L.R.B. which alleged not only a duty of the successor to assume the predecessor's bargaining obligation but also its labor contract. See, e.g., *Valleydale Packers, Inc.*, 162 N.L.R.B. 1486, aff'd. *N.L.R.B.* v. *Valleydale*, 402 F.2d 768 (1968); *Hackney Iron & Steel*, 167 N.L.R.B. No. 84 (1967). But in both *Valleydale* and *Hackney*, the Labor Board was constrained "not to determine the respondent's liability, if any, under the predecessor's collective bargaining agreement."

But in *International Chemical Workers Union* v. *N.L.R.B.*, 395 F.2d 639 (D.C. Cir. 1968), the Court of Appeals thought that the duty of a successor to assume the predecessor's labor contract "needs more illumination than the Board has provided in order for us meaningfully to review the disposition it has made of the matter here." 395 F.2d at 641. Specifically the Court felt that a further explication by the N.L.R.B. was required *especially in the light of Wiley* v. *Livingston*, supra. The Board combined this remand with other cases pending on Trial Examiner's reports; ordered a public hearing; invited a number of organizations to participate as *amicus curiae;* held hearings, and subsequently decided the issues raised on May 7, 1970, in a series of cases entitled, *"Burns International Detective Agency, Inc.*, 182 N.L.R.B. No. 50; *Hackney Iron*

[6] General Counsel Report on Case-Handling Developments, 58 L.R.R.M. 54, 58 (1965).

*& Steel Co.*, 182 N.L.R.B. No. 53; *Kota Division of Dura Corp.*, 182 N.L.R.B. No. 51 and *Travelodge Corp.*, 182 N.L.R.B. No. 52."

In *Burns International Detective Agency*, supra,[7] the Board held that a successor employer violated the L.M.R.A. by refusing to honor a contract entered into between a predecessor employer and the collective bargaining representative of the predecessor's employees since the successor employer continued in the same employing industry, and, absent unusual circumstances, the successor employer is required to take over and honor collective bargaining agreements negotiated on behalf of an employing industry by a predecessor employer. The Board added its view that:

> The Supreme Court's decision in *John Wiley & Sons* v. *Livingstone* altered the perspective in which a successor employer's obligations to honor the provisions of a collective bargaining agreement negotiated by his predecessor must be viewed. There, the predecssor employer was absorbed by merger into a larger acquiring company (Wiley). Some of the predecessor's employees were represented by a union, and the collective bargaining contract, which did not contain a successor's clause, was not scheduled to expire until over a year after the merger took place . . . The Court held that even though the predecessor had disappeared as a result of the merger, *all rights of the employees covered by the pre-existing collective bargaining agreement did not terminate.*

Further articulating this rationale in *Burns*, the Board suggested that:

---

[7] Subsequently reversed by the court below, *Burns International Detective Agency* v. *N.L.R.B.*, 441 F.2d 911.

> The concept of substantial continuity in the employing industry enunciated as a necessary condition for the survival of the duty to arbitrate when the ownership of a business changes hands is at the heart of our determination that a purchasing employer is a successor-employer within the meaning of the Act. In essence, the finding of successorship involves a judgment that the *employing industry* has remained essentially the same despite the change in ownership. A normal consequence of such finding is that the successor employer is obligated to recognize and bargain with the union duly selected by the employees—albeit prior to the change in ownership—as their collective bargaining representative. This consequence of successorship is rooted, inter alia, in the fact that: (1) It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace . . .
>
> The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

In *Hackney* and *Dura Corp.*, supra, the Board reached an identical result on the basis of the reasoning it employed in the *Burns* case. And in *Travelodge,* supra, finding an insufficient degree of continuity in the employing enterprise to render the employer there a "successor employer," the Board held, consistent with its holding in *Dura, Hackney* and *Burns,* that the Act was not violated when the employer refused payments required by a predecessor's collective bargaining agreement.

Thus it can be said that with respect to this Court's holding in *Wiley,* supra, the N.L.R.B. has made it abundantly clear that where the element of a substantial continuity of identity in the business enterprise before and after a change in ownership appears it will hold the successor employer bound by the predecessor's entire collective agreement.

In so doing the N.L.R.B. has given full effect to both the holding and the realistic and logical consequences of *Wiley.*

It would appear appropriate to briefly discuss *Wiley* for the purpose of highlighting both what this Court did and did not hold there.

Wiley and Interscience, both publishers, merged. Wiley had 300 employees and an annual business over $9,000,000, and no union. Interscience had 80 employees, 40 of whom were represented by a union, and did about $1,000,000 annually. The merger took place while Interscience's labor contract was in effect. The Court held that Wiley had an obligation to arbitrate under the Interscience contract grievances concerning the continuing viability of the rights of the former Interscience employees in seniority, pension contributions, job security, severance pay and vacation pay.

This Court discussed the unique nature of the labor contract, the significance of the fact that Wiley was not a signer, and found traditional concepts of privity no barrier. The rationale of *Wiley* was that the "rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers must be balanced by some protection to the employees from a sudden change in the employment relationship." 376 U. S. 549. But the Court was careful to note that this result would not obtain

in every case, noting that, "There may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without." 376 U. S. at 551.

Here, both PPA, the reorganized corporation, and Roitman-Terminal were and are engaged in the same industry; maintain membership in the same employer's Association; utilize employees performing precisely the same kind of work. In a word, as the District Court found, the successor corporation is engaged in essentially the same type of business as the predecessor.

We suggest that the District Court's factual disposition as aforesaid amply supports the Wiley test of a substantial continuity of identity in the business enterprise before and after the change.

The Court of Appeals have construed *Wiley* as applicable to a sale of assets as to a merger. In *Wackenhut Corp.* v. *United Plant Guards,* 332 F.2d 954, the Ninth Circuit held that the purchaser was "bound by the collective bargaining agreement and is bound thereunder to arbitrate the union grievances." 332 F.2d at 958.

In *United Steelworkers of America* v. *Reliance Universal, Inc.,* 335 F.2d 891, the Third Circuit held that the seller's labor contract "remained the basic charter of labor relations" but noted that in the arbitration of any grievance that the "arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable."

Nevertheless, the Third Circuit and the Ninth Circuit holdings may not be realistically distinguished. *Wackenhut* says that the contract survives and the buyer is required to arbitrate grievances. *Reliance* holds that the contract is a basic charter but the arbitrator may give weight to any change in circumstances created by the sale. It would not appear that arbitration under either holding would be any different.

Moreover, the N.L.R.B. has held, and the Courts of Appeal have affirmed, the imposition of an entire union contract of a predecesso upon the successor. See *Ranch-Way, Inc.* v. *N.L.R.B.*, (decided June 24, 1971), —— F.2d ——, unofficially reported at 77 L.R.R.M. 2689. The *Ranch-Way, Inc.* v. *N.L.R.B.* holding is discussed at greater length hereinafter.

It would seem fair to say that the Board, with the approval of the Third, Ninth and Tenth Circuits, has interpreted this Court's holding in *Wiley,* supra, as requiring both the duty to arbitrate and the assumption by a successor of a predecessor's labor contract where the requisite "substantial continuity of identity" before and after the sale, lease, or reorganization is found. But it should also be pointed out that no competing union was present in any of the foregoing cases.

B. *Wiley Under Section 301 And The Competing Union.*

The variant of a competing union initially arose in a 301 action decided by the Second Circuit in *McGuire* vs. *Humble Oil & Refining Co.,* 355 F.2d 352 in 1966. And it should be said that the case at bar was decided by the Court below at least partially on the authority of *Humble Oil.* But to

analyze *Humble* is to distinguish it from the factual situation presented here.

The seller in *Humble* operated a coal and fuel oil business and had labor contracts covering its drivers and mechanics. Humble bought the trucks and other equipment and on the day of the sale the trucks were removed and repainted and the employees retained by Humble were removed away from the seller's premises. After a 301 action was filed by the seller's union to compel arbitration of claims under its contract, the N.L.R.B. clarified the Humble bargaining unit *and held the seller's employees had been merged into the pre-existing Humble unit.* The Second Circuit refused to compel arbitration, finding the presence of Humble's union to be dispositive; and noting that to require Humble to arbitrate with a minority union when a majority union was in existence would be to force Humble to commit an unfair labor practice. Clearly the decisive elements which were present in *Humble Oil* are absent here. For in this case no unit clarification proceeding was initiated by the reorganized enterprise. And this action did not seek to compel arbitration but simply sought damages for contract breach and for incidental, injunctive and declaratory relief.

On the contrary, the relief sought here would be compatible with *Wiley's* basic premise that satisfaction of preexisting contractual commitments by a successor employer's consonant with the national labor policy in that it gives full effect to the stability in labor-management relations sought and achieved by the labor agreement while protecting the contract rights of employees disadvantaged in this era of unprecedented conglomerates, holding companies, mergers, acquisitions and sales. First, there was no unit clarification

proceeding initiated by the reorganized enterprise here. Among other things, the labor contract involved in this case was a multi-employer agreement and it was necessary to petitioner's majority status *in the appropriate multi-employer unit* that it have a single employee member in the reorganized enterprise. *N.L.R.B.* v. *John J. Corbett Press,* 401 F.2d 673 (1968).

Second, this was an action for contract breach seeking damages, injunctive and declaratory relief. Thus, there was no inevitable collision between petitioner and Local 210.

For example, petitioner's collective bargaining agreement (201-a at —— 220-a and the Local 210 contract, 233-a-249-a) are almost *in haec verba* with the exception of the amounts of the wages and other economic benefits. The Labor Board has long recognized under certain circumstances the feasibility and legality of co-existing agreements. See e.g., *Associated General Contractors,* 182 N.L.R.B. No. 29; 74 L.R.R.M. 1050; *Hayes Express, Inc.,* 134 N.L.R.B. 408, 49 L.R.R.M. 1176 (1961).

And certainly in a reorganization on a 50-50 or even basis such as that here attempted, the basic premise of *Wiley,* supra, that the satisfaction of pre-existing contractual commitments by a successor employer serves the national labor policy by giving full effect to the stability in labor-management relations sought and achieved by the labor agreement is frustrated by the holding below which permitted the reorganized enterprise, i.e., the successor, to choose between two labor agreements and select the one providing the lower wages and benefits.

Apart from disadvantaging the employees directly affected, the industry working conditions established by

petitioner's agreement were at the same time and to the same extent undermined.

This Court in *Wiley,* supra, specifically noted its concern for "some protection to the employees from a sudden change in their employment relationship" and was plainly not oblivious to the fact that where the same industry was involved the industrial community remained the same after the reorganization and the subsequent physical integration. In such a situation no particularly troublesome conceptual problem of privity of contract is presented. Nor is such a problem here involved. In fact, the contrary is the case. For as the record discloses, the consolidation agreement itself provided for the successor to discharge the contract obligations of the predecessor to the petitioner. And from this record there does not emerge any overriding "unusual circumstances" which the Court below could have, consistent with the *Wiley* doctrine, interpreted as imposing a forfeiture upon petitioner and its Roitman-Terminal employees of their contract rights—rights that were assumed by the successor in the consolidation agreement.

While it is true that this Court in *Wiley* imposed only the obligation to arbitrate, this was the only contract obligation this Court was requested to impose. But the obligation to arbitrate is a contract right and carries with it the obligation to abide by the arbitrator's award, which in turn results in the disposition of substantive economic issues such as wages, hours, working conditions, pensions, and health and welfare benefits. To suggest, then, that this Court in *Wiley* by imposing upon a successor employer the obligation to arbitrate was knowingly limiting its holding to a procedural fiat is to attribute to this Court an unsupport-

able naivete respecting the impact of the *Wiley* holding.

Nor can it be held consistent with *Wiley* that the mere existence in a new plant of another union is "sufficient to defeat any conclusion that Pride Papers can be held to be a successor employer." Were this conclusion valid, then no successor employer could ever be bound in sales, mergers, acquisitions or consolidations *despite the terms of a predecessor contract* and notwithstanding the fact that the merger consolidation instrument itself provided, as it does here, for the merged enterprise to assume the collective bargaining contract of the predecessor employer. Such a result is in the teeth of the national labor policy to promote stability in labor relations by giving the fullest possible effect to the collective bargaining agreement as an instrument of industrial peace and would appear to put a premium on contract breach because of the coincidence of a "competing union" *even though the judicial relief sought here by petitioner was wholly compatible with the presence of Local 210.* The result reached below would not minimize but, to the contrary, would lead to a proliferation of labor disputes by authorizing the total disregard of petitioner's labor contract—a result respondents themselves plainly did not contemplate inasmuch as they specifically provided for the assumption of that contract by the consolidated enterprise.

C. *Burns And H. K. Porter.*

But apart from a conflict in the decision below with the decision of this Court in *Wiley* is the fact that the Court below rested its holding on its own decision in *Burns, et al.* v. *N.L.R.B.*, 441 F.2d 911 and therefore, at least *sub silentio,*

upon the decision of this Court in *H. K. Porter* v. *N.L.R.B.*, 397 U. S. 99.

To demonstrate the plain irrelevance of the *Porter* holding to either *Burns* and therefore to the case at bar it is appropriate to discuss briefly the facts underlying and accordingly the context in which *Porter* was decided.

The United Steelworkers were certified by the N.L.R.B. to represent certain employees at the Danville, Virginia plant of H. K. Porter. Negotiations for a collective bargaining agreement commenced. The controversy "seesawed between the Board, the Court of Appeals for the District of Columbia Circuit, and this Court" for over eight years—"chiefly because of the skill of the Company's negotiators in taking advantage of every opportunity for delay in an act more noticeable for its generalities than for its precise description." 397 U. S. 100.

The union desired to have the Company check off dues. The Company refused on the ground that it was not going to aid and comfort the union. Based on this and other evidence the Board found and the Court of Appeals approved the finding that the refusal of the Company to bargain about the check-off was not made in good faith.

In deciding the case the Court of Appeals intimated that the Board might have required the Company to agree to a check-off provision as a remedy for the prior bad faith bargaining. Finally after various requests for contempt proceedings, the Court of Appeals issued an opinion in which it held that in certain circumstances a check-off may be imposed as a remedy for bad faith bargaining. See *United Steelworkers* v. *N.L.R.B.*, 389 F.2d 295, 298. The Board then issued a supplemental order requiring the Com-

pany to grant the union the contract clause providing for the check-off of union dues. 172 N.L.R.B. No. 72. The Court of Appeals affirmed. 414 F.2d 1123. Against that backdrop, this Court held that the National Labor Relations Act does not empower the Board "to compel a company or a union *to agree*" to any substantive contractual provision of a collective bargaining agreement. 397 U. S. at 102. To hold, as did the Court below in *Burns,* supra, that because the Board is without power under the National Labor Relations Act "to compel a company or a union *to agree*" to any substantive contractual provision of a collective bargaining agreement means that the Board is without power to enforce upon a successor employer *an agreement already made* is a perfect *non sequitur.*

Thus the reliance by the Court below upon its decision in *Burns* and therefore this Court's decision in *Porter,* supra, is misplaced and represents a plain conflict with this Court's holding in the *Porter* case. For what we are concerned with here is the enforcement of an *existing* contract against a successor employer under an agreement between the predecessor *and successor employer* under the terms of which the successor adopted the contractual obligations of the predecessor to the petitioner. The equation between enforcing an existing agreement and writing a new one by the Court below is patently erroneous.

D. *The Decision Of The Court Of Appeals Is In Conflict With Compatible State Law.*

This Court in *Textile Workers* v. *Lincoln Mills,* 333 U. S. 448, noted that: "State law if compatible with the purpose of § 301, U.S.C. 185(a) may be resorted to in order to find the rule that will best effectuate the federal policy." *Charles*

*Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 506.

Section 906 of the Business Corporation Law of the State of New York (McKinney's, 1963), provides in relevant part that: "The surviving or consolidated corporation shall be liable for all the liabilities, obligations, and penalties of each of the constituent corporations."[8] Here, not only was the consolidation agreement by its terms subject to New York State law but the consolidation agreement itself provided for the assumption of petitioner's contract by the successor. By disregarding compatible State law, the Court below offended the teachings of *Lincoln Mills* and *Dowd*.

2. *The Decision Below Would Appear To Be In Conflict With Decisions Of Other Courts Of Appeal On The Same Issue.*

The Court below flatly held that: "The only obligations that have been imposed *by the courts* on successor employers are the obligations to arbitrate." This misconception permeates the entire opinion of the Court of Appeals and is at variance with the Tenth Circuit's recent holding in *Ranch-Way, Inc.* v. *N.L.R.B.*, (decided June 24, 1971) —— F.2d ——, unofficially reported at 77 L.R.R.M. 2639.

In *Ranch-Way* the entire union contract of a predecessor was imposed upon the successor—first by the N.L.R.B. and then by the Tenth Circuit—in accordance with the view of that Circuit that: "Where there has been a lock, stock and barrel sale of a going concern resulting in a substantial continuity of identity, the purchaser is bound by the collective bargaining provisions of an agreement between its predecessor and a union."

---

[8] See *Hoche Productions, S.A.* vs. *Jayark Films Corp.* (D.C. N.Y.) 256 Fed. Supp. 291.

Thus not only the arbitration provisions of the agreement were enforced, the Tenth Circuit squarely held that the successor was "bound by the collective bargaining provisions of the union contract" without exception.

Interestingly, Labor Relations Reporter noted that the Tenth Circuit did not refer to the Second Circuit's holding in *William J. Burns Detective Agency,* supra. Accordingly, we suggest a conflict between the Tenth and Second Circuits. For in this case the Second Circuit squarely held that there is "no reason either in policy or precedent which would justify a court imposing a contract in a situation such as that presented by the present case," which observation, considered in tandem with the Court's below notion that "the only obligations that have been imposed by the courts on successor employers are the obligations to arbitrate" demonstrates either an unawareness of or a disagreement with the Tenth Circuit's *Ranch-Way,* supra, and other holdings cited therein.

3. *The Court Of Appeals Has Decided An Important Question Of Federal Law Which Should Be Settled By This Court.*

While the duty to arbitrate imposed upon a successor employer in *Wiley* may be arguably all that was within the reasonable expectations of the fact situation before the Court in the *Wiley* case, there have arisen inevitably in post-Wiley cases a variety of fact situations including the authority of a court to impose an entire labor contract upon a successor; the authority of the court to award damages for the breach of a labor contract against a successor where another union exists at the reorganized enterprise, and a myriad of other variations of the basic principle declared

in *Wiley*. Such an issue is squarely before the Court in this case. Mergers, acquisitions, reorganizations, consolidations and sales in the business community are now the order of the day. It is in the national interest that this Court declare under the fact situation presented by this case the obligations of a successor employer to carry out the terms of a predecessor's agreement where the consolidation agreement bringing into being the reorganized enterprise expressly provided for such a contingency.

It is vital to the goal of industrial harmony that this Court speak to the question of whether the mere existence of another labor union at a reorganized enterprise is sufficient warrant for a successor employer to repudiate at will the predecessor's contractual obligations even after the predecessor had specifically assumed such obligations by contract.

Within this factual situation there is embedded both the sharp and even cruel changes in employment relationships experienced by the employees directly affected by the reorganization here and the potential for instability in the multi-employer industry contemplated by petitioner's labor agreement. The circumstances of this case persuade that the issue involved respecting the inviolability of the collective agreement in a reorganization context represents an issue which can only be put at rest by a final determination of this Court.

## CONCLUSION

It is respectfully requested that the reasons hereinabove asserted this petition for a writ of certiorari should be granted.

JOHN S. MCLELLAN
421 E. Market Street
Kingsport, Tennessee 37660
FRANK SCHEINER
401 Broadway
New York, New York
DONALD M. MURTHA
ANTHONY F. CAFFERKY
1828 L Street, N.W.—Suite 703
Washington, D. C. 20036
*Attorneys for Petitioner*

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

Nos. 743, 744—September Term, 1970.
(Argued April 25, 1971 Decided June 15, 1971.)
Docket Nos. 35504, 35505

---

PRINTING SPECIALTIES & PAPER PRODUCTS UNION No. 447 INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS UNION OF N. A., AFL-CIO,

*Plaintiff-Appellant,*

v.

PRIDE PAPERS AARONSON BROS. PAPER CORPORATION, PRIDE PAPERS, DIVISION OF AARONSON BROS. PAPER CORPORATION, AARONSON BROS. PAPER CORPORATION, ROITMAN PAPER CO. INC., and TERMINAL PAPER CONVERTING INC.,

*Defendants-Appellees.*

Before:

---

HAYS and FEINBERG, *Circuit Judges,* and
BLUMENFELD, *District Judge.**

---

Appeal from orders of the United States District Court for the Southern District of New York, Harold R. Tyler, *Judge,* entered after trial without jury, dismissing the complaint which sought relief under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185 (1964))

---

* Of the United States District Court for the District of Connecticut, sitting by designation.

for breach of a collective agreement and denying appellant's motion for a new trial.

Affirmed.

---

DAVID SCRIBNER (Frank Scheiner, New York, N. Y., Joel C. Glanstein, Scribner, Glanstein & Klein, New York, N. Y., on the brief), *for Plaintiff-Appellant.*

NOEL ARNOLD LEVIN (Jerome M. Schwartz, Levin, Rosmarin & Schwartz, New York, N. Y., on the brief), *for Defendants-Appellees.*

HAYS, *Circuit Judge:*

This action was instituted in the United States District Court for the Southern District of New York to obtain declaratory, injunctive and monetary relief under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185 (1964) for alleged breaches by the defendants of a collective bargaining agreement between appellant union and defendants Roitman Paper Co., Inc., and its wholly owned subsidiary, Terminal Paper Converting, Inc. After trial without a jury, Judge Tyler dismissed the complaint and later denied plaintiff's motion for a new trial. We affirm.

Roitman Paper Co., Inc. and Terminal Paper Converting, Inc. were members of The Paper Merchants Association of New York which executed a multi-employer collective bargaining agreement with plaintiff, Printing Specialties & Paper Products Union No. 447, International Printing Pressman and Assistant Union of N. A., AFL-CIO in 1961. This agreement was subsequently modified and extended to August 31, 1967.

On December 23, 1964, Roitman-Terminal entered into a consolidation agreement with defendant Aaronson Bros.

Paper Corporation which was engaged in a similar line of work. The new firm was to operate at the Brooklyn plant of Aaronson under the name Pride Paper-Aaronson Bros. Paper Corporation, and Max Roitman, the sole owner of Roitman-Terminal, became the executive vice-president and secretary of the new corporation, with a 50% stock interest.

At the time of the consolidation, Aaronson Bros. had 26 employees who remained with the new company. These employees were represented by Local 210, International Brotherhood of Teamsters, which had a collective bargaining agreement with Aaronson Bros. covering their work.

Negotiations with regard to the new firm's hiring the seven employees of the old Roitman firm failed and these employees were sent the following notice on December 24, 1964:

> "This is to inform you that this company will cease its production operations effective December 24, 1964. Your services will no longer be needed after January 8, 1965.
>
> This is to be deemed notice in accordance with collective bargaining agreement between this company and your union."

The consolidation was effectuated, and Roitman-Terminal closed down its Manhattan plant. All obligations owing to the former Roitman employees and to the plaintiff union for the various funds provided in the collective agreement were paid.

Plaintiff union filed suit for an alleged breach of the Local 447 Industry Association collective bargaining agreement. The complaint sought a declaratory judgment that the contract was still in effect at the new consolidated plant, damages on behalf of Local 447 and the affected employees, and injunctive relief to insure the continued

enforcement of the agreement at the Pride-Paper Aaronson Bros. plant.

Plaintiff refers us to a provision in the consolidation agreement which states that "all obligations, present and future under a contract or contracts, between Roitman Terminal and the labor union representing the employees of Roitman and Terminal" were to be assumed by the consolidated operation. This provision cannot properly be interpreted to mean that the old Roitman-Terminal employees could not be terminated, or that if they were terminated, the new operation was required to continue paying their wages. It is extremely significant that the consolidation agreement contained no provision with respect to the employees of what was formerly Aaronson Bros. Paper Corp. The provision of the consolidation agreement clearly refers to those contractual obligations of Roitman-Terminal, such as payment to the various union funds, which would be due upon termination of the collective agreement. These obligations were met by Pride Papers.

The plaintiff union does not expressly claim that the seven former Roitman employees had to be re-employed by the consolidated company. Such a contention, based on the supposition that contractual obligations somehow survived termination of the contract, would be unavailing in the light of our opinion in *Local 1251 Int. U. of U. A., A. & A. I. W.* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968), overruling *Zdanok* v. *Glidden Co.*, 288 F.2d 99 (2d Cir.), cert. denied on this issue, 368 U.S. 814 (1961).

Plaintiff union's principal contention is that the 26 Aaronson employees who were retained by the new company must now be paid the wages and receive the benefits provided by the Local 447 Industry Association agreement. None of these employees were ever represented by Local 447. On the contrary they were represented under a valid existing collective agreement by another union. Plaintiff

argues, however, that the new company is a "successor employer" to Roitman-Terminal and that as such a "successor employer" the new company was required to assume the employer's obligations under the old collective agreement. We reject this argument.

"[C]ontinuity in the business operation" is the essential test for successorship. *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970). In effect, all that really occurred in the instant case is that Roitman closed down his small business and discharged his employees. He then acquired an interest in a new business at a different location, with different employees. The fact that no Roitman-Terminal employees worked at the new enterprise is most compelling evidence of a lack of substantial continuity in the business enterprise.[1]

Moreover, plaintiff's position would not be sustainable even if in some sense Pride Papers could be said to be a "successor" to Roitman-Terminal. The only obligations that have been imposed by the courts on successor employers are the obligations to arbitrate (see, e.g., *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964); *Monroe Sander Corp.* v. *Livingston, supra*) and to recognize and bargain with the union (see, e.g., *NLRB* v. *Zayre Corp., supra; Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025 (7th Cir. 1969). The existence at the new plant of another union which represents all of the employees under an existing collective agreement, is sufficient to defeat any conclusion that Pride Papers can be held to be a "successor employer" to Roitman-Terminal for purposes of arbitra-

[1] In *Monroe Sander Corp.* v. *Livingston*, 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), we found a successorship although none of the former employees were hired by the successor corporation. In that case, however, continuity was evidenced by many factors, not the least of which was the fact that the transaction involved "a parent corporation's termination of one subsidiary plant and the purchase of another." *Id.*

tion. *McGuire* v. *Humble Oil and Refining Company,* 355 F.2d 352 (2d Cir.), cert. denied, 384 U.S. 988 (1966). As a matter of fact, in the instant case neither party seeks arbitration. Moreover, the union apparently does not seek recognition as the representative of Pride Papers' employees.

The union is in effect asking this court to impose the terms of the collective bargaining agreement negotiated with the now defunct Roitman-Terminal operation on the new consolidated company. In our recent decision in *The William J. Burns International Detective Agency* v. *NLRB* (slip op. filed April 26, 1971) we held that the National Labor Relations Board could not impose "a collective agreement upon an unwilling party who had no part in the negotiation of the agreement." (*Id.* at 2571.) There is no reason either in policy or precedent which would justify a court's imposing a contract in a situation such as that presented by the present case.

The judgment of the district court is affirmed.

## APPENDIX B

### Opinion of Tyler, D. J. Dismissing Complaint

(DOCUMENT No. 26)

This is an action by a labor union, Printing Specialties and Paper Products Union No. 447 ("Local 447"), against a successor corporation, Pride Papers-Aaronson Bros. Paper Corporation ("PPA") for declaratory judgment and specific enforcement of a collective bargaining agreement executed by PPA's predecessors, Roitman Paper Co., Inc. and its wholly-owned subsidiary Terminal Paper Converting, Inc. ("Roitman-Terminal"). Plaintiff commenced this action on April 9, 1965. Trial was held before me without a jury on March 2 and 3, 1970. Jurisdiction is founded on Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The following constitutes my findings and conclusions pursuant to Rule 52, F.R.Civ.P.

Until early January, 1965, defendant Roitman-Terminal and defendant Aaronson Bros. Paper Corporation ("Aaronson") were engaged in the business of warehousing, processing, converting, wholesaling and distributing fine paper products. Roitman-Terminal was located at No. 624 West 28th Street, Manhattan. Aaronson was located at No. 184 Kent Avenue, Brooklyn. On December 23, 1964, Roitman-Terminal and Aaronson entered into an agreement whereby Roitman-Terminal agreed to transfer all of its properties and assets to Aaronson in exchange, *inter alia,* for the issuance of 50% of Aaronson common stock to Roitman-Terminal. This stock would then be distributed in liquidation to Max Roitman, Roisman-Terminal's then president and sole owner. Thus, Mr. Roitman would and did become the single largest stockholder in the successor corporation, PPA. As further consideration, Aaronson agreed to assume all Roitman-Terminal obligations and liabilities, including "all obligations, present and

future under a contract or contracts between Roitman, Terminal and the labor union presently representing the employees of Roitman and Terminal. . . ." (Plaintiff's exhibit C.) This transaction was consummated on or about January 9, 1965. PPA continues to this day to operate at No. 184 Kent Avenue, Brooklyn, and to conduct substantially the same type of operation as its predecessors.

Plaintiff, Local 447, is an unincorporated association affiliated with the International Printing Pressmen and Assistants Union of N.A., AFL-CIO. On November 27, 1961, Local 447 and Roitman-Terminal, as one of several employer members, entered into a multi-employer association collective bargaining agreement covering all Roitman-Terminal employees. On September 1, 1964, Local 447 and the employers, including Roitman-Terminal, executed a second agreement modifying the first and extending the period of coverage to August 31, 1967. Thus, at least up until the time of the above mentioned transaction between Roitman-Terminal and Aaronson, the Local 447 contract was in full force and effect. Aaronson, at this time, had a collective bargaining agreement with a different union, Local 210 of the International Brotherhood of Teamsters. Under this agreement, which, incidentally, antedated the Roitman-Terminal-Local 447 agreement by several years, Local 210 had exclusive bargaining rights for all shop, receiving, shipping and related personnel at Aaronson, including any accretions to the unit.

Beginning sometime in the fall of 1964 and continuing into the spring of 1965, Max Roitman and the officials at Local 447 carried on extended negotiations in an effort to resolve the question of the effect of the transfer on Local 447's rights under its collective bargaining contract. At one point, Mr. Roitman offered to secure employment for the Local 447 workers at PPA without reduction in pay.

Local 447 insisted, however, that it be permitted to remain as the bargaining agent for these employees at the new firm. Negotiations finally terminated sometime in the spring of 1965 when it was learned that Local 210 would oppose by way of strike and/or court action any attempt to deprive it of its rights as exclusive collective bargaining agent at PPA. None of the Local 447 workers ever went to work for PPA. They were paid in full, however, for all services up to the time of the transfer, and each sought and obtained employment elsewhere.

There is no serious dispute that the transfer by Roitman-Terminal of all of its properties and assets to Aaronson was done for legitimate business reasons and not because of any anti-union motivation. Max Roitman was apparently having some difficulty with his partner. Business was falling off, the fixed overhead was apparently very high and the future profit picture looked bleak. Thus, a "consolidation" with a slightly larger, stronger company engaged in the same type of activities made good business sense.

Thus, the sole substantial issue in this litigation is whether or not the transaction between Roitman-Terminal and Aaronson relieved the defendants of the responsibility of performing and discharging the employer obligations under the Local 447 collective bargaining contract. Put differently, the question is what obligations of Roitman-Terminal under this contract, if any, survived the transfer.

According to Local 447, despite this transfer, the Local 447 agreement with Roitman-Terminal is still viable and binding upon the successor corporation because PPA expressly agreed to assume all Roitman-Terminal obligations under its union contract. On the other hand, defendants assert that PPA agreed to assume only those obligations

of Roitman-Terminal under its labor contract which survived the transfer and that, under the facts in this case, no such obligations survived.

SPECIFIC ENFORCEMENT

No court to my knowledge has granted the type of relief plaintiff seeks here, that is, specific enforcement of a collective bargaining agreement against a successor corporation. The leading decision in this general area of the law is, of course, *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964). In *Wiley* the plaintiff, a labor union, sought to compel the defendant, a successor corporation, to arbitrate the dispute between the parties concerning the effect of the consolidation or merger upon the collective bargaining agreement. *Wiley,* in a carefully limited opinion, held:

> "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all the rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." 376 U.S. at 548.

Although the plaintiff in *Wiley* did not specifically request the Court to declare the entire collective bargaining agreement binding upon the successor corporation, the Court did state that, "[w]hether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts" 376 U.S. at 555. Relying upon this language, the court in *Retail Store Emp. U., Local No. 954* v. *Lane's of Findlay, Inc.,* 260 F. Supp. 655 (N.D. Ohio 1966), confronted with the demand to declare the entire collective bargaining agreement binding upon a

successor corporation, ruled that to grant this demand would in effect require the courts to pass upon the merits of the union's claims and that the courts were not the proper tribunals to resolve these issues. Other courts have analyzed *Wiley* the same way. In *McGuire* v. *Humble Oil & Refining Company,* 247 F. Supp. 113, 127 (S.D.N.Y. 1965), rev'd on other grounds, 355 F.2d 352 (2d Cir. 1966), cert. denied, 384 U.S. 988 (1966), this court (Tenney, D.J.) stated, "I do not hold . . . that the entire collective bargaining agreement survived the purchase. To decide that issue is to grant specific performance of the collective bargaining agreement and to usurp the function of the arbitrator." See also, *United Steelworkers of Amer.* v. *Reliance Univ. Inc.,* 335 F.2d 891, 894-895 (3d Cir. 1964). Similarly, I conclude that this Court is not the proper tribunal to pass upon this question.

DUTY TO ARBITRATE

Local 447 has not specifically included a request for enforcement of the arbitration clause of its collective bargaining agreement; however, in order to avoid further unnecessary litigation, I will assume that such a demand has been made. I see no prejudice to defendants in so assuming. Its briefs adequately meet this contingency. For reasons to be discussed hereinafter, I conclude that the duty to arbitrate did not survive this transaction, and thus this action must be dismissed in its entirety.

One of the principal objectives of national labor policy is to avoid industrial strife. *John Wiley & Sons Inc.* v. *Livingston, supra; Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574 (1960). *Wiley* felt that this objective could best be effectuated in a situation where there has been a "transition from one corporation to another" if the successor corporation were required to resolve employee

claims through arbitration rather than the "relative strength . . . of the contending forces".[1] 376 U.S. at 550. In *Wiley,* however, unlike the case at bar, there was no other union representing the employees of the purchasing or acquiring corporation.

In *McGuire* v. *Humble Oil & Refining Company,* 355 F.2d 352 (2d Cir. 1966), cert. denied, 384 U.S. 988 (1966), our

[1] *Wiley* made it quite clear that the duty to arbitrate would not survive in all cases. One prerequisite is that there must be "substantial continuity of identity in the business enterprise before and after a change . . ." 376 U.S. at 551. The court did not attempt to explain this phrase except to say that under the facts presented, i.e., a merger coupled with a wholesale transfer of employees to the new firm, substantial continuity of identity existed. Substantial continuity of identity has been found to exist where there has been a mere sale. *United Steelworkers of Amer.* v. *Reliance Univ. Inc.,* 335 F.2d 891 (3d Cir. 1964); *Wackenhut Corp.* v. *International U., Unitel Plant Guard W.,* 332 F.2d 954 (9th Cir. 1964). A number of other courts have attempted to define this phrase; however, no clear test or tests have emerged. See *Retail Store Emp. U., Local No. 954* v. *Lane's of Findlay, Inc.,* 260 F. Supp. 655 (N.D. Ohio 1966); *Retail Clerks Union Local No. 1552* v. *Lynn Drug Company,* 299 F. Supp. 1036 (S.D. Ohio 1969); *Owens-Illinois, Inc.* v. *District 65, Retail, Whole. & Dept. St. U.,* 276 F. Supp. 740 (S.D.N.Y. 1967), aff'd 393 F.2d 932 (2d Cir. 1968); *Monroe Sander Corporation* v. *Livingston,* 262 F. Supp. 129 (S.D.N.Y. 1966), modified, 377 F.2d 6 (2d Cir. 1967), cert. denied, 389 U.S. 831 (1967). Each case must rest on its own facts. Here, of course, Aaronson issued 50% of its common stock to Roitman-Terminal in return for all Roitman-Terminal properties and assets, which transaction apparently qualified as a tax free transfer as defined by 26 U.S.C. § 368(a)(1)(C). The successor corporation is engaged in essentially the same type of business as the predecessor. None of the former Roitman-Terminal employees, however, ever went to work for PPA. Certainly, from the standpoint of the former employees of Roitman-Terminal there is no "substantial continuity of identity in the business enterprise."

Court of Appeals held that the presence of another union at the successor firm, coupled with the fact that this union had been certified by the National Labor Relations Board as the exclusive bargaining representative of all employees, made the enforcement of the arbitration clause of the predecessor firm's union contract as against the successor "unpractical and inequitable."[2] 355 F.2d at 353. Because of what it termed "the union features of this case" and "[i]n the light of *Wiley*," the court felt that it could not arrive at any other conclusion "than that to direct arbitration . . . would disturb the harmony of the existing body of federal labor law and tend to foster rather than prevent industrial strife and unrest." 355 F.2d at 357. See also *Southern Conference of Team.* v. *Red Ball Motor Freight, Inc.*, 374 F.2d 932 (5th Cir. 1967); *Bath Marine Draftsmen's Ass'n* v. *Bath Iron Works Corp.*, 266 F. Supp. 710 (D. Maine 1967), aff'd 393 F.2d 407 (1st Cir. 1968). Here, of course, Local 210 was and is the exclusive bargaining agent for all employees at Aaronson, now PPA. The Local 210-Aaronson agreement antedates, by several years, the Local 447-Roitman-Terminal agreement. If this court were to order PPA to arbitrate with Local 447, the potential for "industrial strife" is obvious. Indeed, at the time of the transaction in question, Local 210 stated its position quite clearly: it would strike and/or sue if Aaronson (or PPA)

[2] Factually, *McGuire* is distinguishable from this case in that the defendant successor corporation, Humble Oil & Refining Co., purchased only part of the business of Weber and Quinn, the predecessor, and 13 out of 24 Weber Quinn employees actually went to work for Humble. The court made it clear that the fact that this was only a partial acquisition in no way affected the outcome, and the court expressly declined to consider the "substantial continuity of identity" issue. The fact that none of the former Roitman-Terminal employees ever went to work for PPA, in my view, makes this case even stronger.

were to bargain in any way with Local 447. There is no evidence or likelihood that Local 210 has changed its position.[3]

Finally, it may be relevant to note that if PPA were to arbitrate the Local 447 claims, it could be charged with committing an unfair labor practice *vis-a-vis* Local 210. It is a settled principle of labor law that an employer must bargain with the employees' exclusive bargaining representative, here Local 210, and no other. *Medo Corp.* v. *Labor Board,* 321 U.S. 678 (1944); *McGuire* v. *Humble Oil & Refining Company,* 355 F.2d 352, 358 (2d Cir. 1966). See also 29 U.S.C. § 158(a)(5); 29 U.S.C. § 159(a). To bargain with another would be to commit an unfair labor practice. *Medo Corp.* v. *Labor Board, supra.*

---

[3] Plaintiff makes much of the fact that the Local 447 agreement is a multi-employer association contract and that Aaronson, now PPA, was and is a member of that association. However, what plaintiff has ignored is that although Aaronson, now PPA, was and is an association member, its employees have never been represented by Local 447 and are certainly free to select their own exclusive bargaining representative.

Plaintiff also relies heavily upon the fact that PPA expressly agreed to assume all Roitman-Terminal obligations under its labor contract with Local 447. See discussion *supra,* p. 6. If arbitration were appropriate, the meaning and effect of this clause would be best left to the arbitrator to resolve. As indicated in the text, I conclude that under existing case law, PPA assumed no obligation to arbitrate with Local 447. Even if the law were not clear on the point, I would reach the same result. In my opinion, all of the obligations of Roitman-Terminal under its contract with Local 447 contemplated by this "sale" or "consolidation" agreement were satisfied at the time of the transfer when (a) Roitman-Terminal bargained with Local 447 in good faith on the effects of the impending transfer, (b) when Roitman-Terminal compensated all

*Opinion of Tyler, D. J. Dismissing Complaint*

Accordingly, plaintiff's complaint must be dismissed on the merits. Enter judgment accordingly.

H. R. Tyler, Jr.,
*U.S.D.J.*

Dated: New York, N. Y.
May 7, 1970

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 17 1971
E. ROBERT SEAVER, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1971

**No. 71-385**

PRINTING SPECIALTIES & PAPER PRODUCTS UNION NO. 447, INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

*Petitioner,*

—v.—

PRIDE PAPERS-AARONSON BROS. PAPER CORPORATION, PRIDE PAPERS, DIVISION OF AARONSON BROS. PAPER CORPORATION, AARONSON BROS. PAPER CORPORATION, ROITMAN PAPER CO., INC. and TERMINAL PAPER CONVERTING, INC.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NOEL ARNOLD LEVIN
JEROME M. SCHWARTZ
JEROME H. RETTIG
267 Fifth Avenue
New York, N. Y. 10016

*Attorneys for Respondents*

# Supreme Court of the United States

OCTOBER TERM, 1971

**No. 71-385**

---

PRINTING SPECIALTIES & PAPER PRODUCTS UNION NO. 447, INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

*Petitioner,*

—v.—

PRIDE PAPERS-AARONSON BROS. PAPER CORPORATION, PRIDE PAPERS, DIVISION OF AARONSON BROS. PAPER CORPORATION, AARONSON BROS. PAPER CORPORATION, ROITMAN PAPER CO., INC. and TERMINAL PAPER CONVERTING, INC.,

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents contend that the question presented has not been properly stated by the petitioner. The respondents would restate it as follows:

### Question Presented

Whether the collective bargaining contract to which petitioner and respondents Roitman Paper Co. Inc. and Terminal Paper Converting, Inc. were parties was breached by the fact that said respondents consolidated with another employer which had a different collective bargaining contract with a different union.

It must be noted that respondents Roitman and Terminal had a total of seven employees. Aaronson Bros., the company with which they consolidated, had a total of twenty-six employees—nearly four times as many. Roitman and Terminal terminated operations at their location and all operations were consolidated at Aaronson Bros.' regular location. Aaronson Bros. had a collective bargaining agreement with a different union which resulted from a collective bargaining relationship which had existed since before petitioner organized and represented the employees of respondents. Respondents and Aaronson were in the same industry—i.e., they were "converters" of paper.

Petitioner emphasizes the fact that its collective bargaining contract was with a trade association, as if to imply that that association covered the collective bargaining contracts of all the employers in the industry. That is not the fact and the record in this case does not so indicate. There were many employers in the industry who were not members of that association, such as Aaronson Bros. with which the consolidation was effectuated. Moreover, several of the employers in the industry did not have collective bargaining contracts with petitioner union. In fact some firms, like Aaronson, apparently had contracts with unions other than petitioner.

The petitioner's statement of the question presented says that the consolidation agreement specifically provided for the assumption of the petitioner's collective bargaining agreement by the consolidated company. This is not correct, as was pointed out by the appellate court. The obligations assumed by the consolidated company were the obligations which legally arose under the collective bargaining agree-

ment between petitioner and respondent signatory. Petitioner relies on this assumption. But it is patently obvious that this clause was only intended to obligate the consolidated company to undertake the obligations which respondents Roitman and Terminal legally had without relation to any consolidation. In fact, no new obligations arose nor could they be imposed on the consolidated company by virtue of this wording in the consolidation agreement if, in fact, the said obligations were not pre-existent. The kinds of obligations which did exist insofar as respondents were concerned clearly referred to the contractual arrangements between petitioner and respondents, such as payments to be made to welfare and/or pension funds, payments to individuals, as long as they worked for respondents at respondents' location, in accordance with collective bargaining terms, etc. All of these obligations were completely fulfilled by respondents. And petitioner does not deny this. Furthermore, even if one were to impose an additional non-contractual obligation on respondents based on developing law, i.e., the duty to bargain with petitioner on the impact of the consolidation, it is apparent that respondents fulfilled that duty here. The evidence of negotiations between petitioner union and respondent companies on this point is clear, uncontravened and not denied by the petitioner.

In its opinion, the appellate court said that the provision for the assumption of the obligations of the collective bargaining agreement between Roitman-Terminal and the petitioner cannot properly be interpreted to mean that respondents' employees could not be terminated, or that respondents were required to continue abiding by the old contract at the new bargaining unit in the new location. The

appellate court pointed out that the consolidation agreement contained no provision with respect to the employees of what was formerly Aaronson Bros. Paper Corp. and that the assumption provision clearly referred to those contractual obligations of Roitman-Terminal. (Appendix A, pages 4a, 3a.)

The petitioner's collective bargaining agreement contained no provision prohibiting termination of the business, nor merger or consolidation with another, nor any provision that its terms shall become binding upon any consolidated company. Emphasis should be placed on the fact that the company with which the consolidation took place was covered by a collective bargaining agreement entered into in good faith with another union long prior to the collective bargaining agreement between the petitioner and Roitman-Terminal.

Petitioner union did not invoke arbitration provisions of its contract. At no time did it try to have its grievances against Respondents settled by arbitration, although provisions for such existed in the collective bargaining agreement. Thus, provisions of *Wiley* v. *Livingston,* 376 U.S. 543 do not come into play and its ruling is not applicable in the instant case, as both the trial court and the appellate court unanimously agreed. Moreover, petitioner did not seek recourse to National Labor Relations Board procedures for remedy and redress of its grievances—probably because it knew that under existing law no such relief could be granted.

**The trial court and the appellate court correctly decided the case and there is nothing that warrants review by this Court.**

We do not think that any detailed discussion of the cases cited by the petitioner is necessary or helpful to this Court. Frankly and simply put, these other cases do not apply to the facts as they exist here. All of the cases cited were decided on different principles and/or on distinctive fact situations. To analyze and distinguish these cases would unduly take the time of this Court. We believe that the discussion of the cases cited by petitioner and rationalization of the legal doctrines involved were thoroughly and correctly discussed by both the trial court and the appellate court. And the latter unanimously upheld the trial court and respondents' position. The facts in this case are simple and really not in dispute. A small company with seven employees, finding itself in business difficulties, for legitimate business reasons and not because of any anti-union motivation, decided to consolidate with a company in the same line of business at another location, with twenty-six employees (Appendix B, page 9a). The trial court and the appellate court both found that the consolidated company was not a "successor company", as described by the courts in their definition of "substantial continuity of identity."

The collective bargaining agreement of that small company (Roitman-Terminal) did not in any way prohibit that consolidation. Roitman-Terminal wished to faithfully discharge all its obligations to its employees under its collective bargaining agreement.

As we have seen, it did so. It also sought to assist its employees to avoid loss of work and have them go over to

the consolidated company at the new location. The problem there was that the other company at the other location had a different collective bargaining agreement with a different union. This agreement long antedated the Petitioner's agreement, to which the other company at the new location was not a party. The union at that location threatened to strike if the consolidated company recognized and/or dealt with Petitioner union. In fact, if it had done so, the respondents would have been guilty of an unfair labor practice. If the respondents had dealt with petitioner, they would have dealt with a minority union in the face of a contract already made between Aaronson Bros. and another union which was indeed a majority union. Furthermore, the union at Aaronson Bros. had a collective bargaining agreement with Aaronson Bros. which provided that that union would be the exclusive bargaining agent for the employees of Aaronson Bros. Thus, if respondents and/or the consolidated company recognized petitioner, they would be violating the provisions of a pre-existing collective bargaining agreement. And the realities of labor relations indicates that had they done so the incumbent union would have retaliated by arbitration, NLRB or court proceedings. In addition, as noted, it actually threatened to strike if this occurred. Thus, rather than be further enmeshed in what could have become a major jurisdictional dispute, respondents and the consolidated company honored their collective bargaining agreements and the consolidated company dealt with the majority union, not the minority union.

Thereupon, the petitioner sued for the specific enforcement of its collective bargaining agreement by the successor corporation (a form of relief never before granted in

circumstances like this) (Appendix B, page 10a), and for a declaratory judgment and for damages, which damages had they been recovered could have destroyed the businesses of the respondents. Arbitration was not demanded by either party.

Under these circumstances, the trial court and the appellate court both held that there was no substantial continuity in the new business enterprise so as to make the successor company liable to carry out the petitioner's collective bargaining agreement (Appendix A, page 5a; Appendix B, pages 12a and 13a). They held also that arbitration, ever. if demanded, would not be appropriate (Appendix A, pages 5a and 6a; Appendix B, pages 11a-13a).

It is respectfully submitted that no unique question of labor law exists. This is not even in a borderline area. The District Court and Court of Appeals have followed established and understood case law in their decision. Moreover, we submit that this has not only been the prevailing case law in the Second Circuit (see *McGuire* v. *Humble Oil & Refining Company,* 355 F.2d 352 [2d Cir. 1966], cert. denied 384 U.S. 988 [1966]), but is also the law in other circuits (see, e.g., *Southern Conference of Teamsters* v. *Red Ball Motor Freight, Inc.,* 374 F.2d 932 [5th Cir. 1967]; *Bath Marine Draftsmen's Assoc.* v. *Bath Iron Works Corp.,* 266 F. Supp. 710 [D. Maine 1967], aff'd 393 F.2d 407 [1st Cir. 1968]). We do not know of any cases in other circuits nor any subsequent cases in these circuits which come to a contrary conclusion.

The law concerning problems of this nature is well-settled, established and relied upon by practitioners in the field. For this reason and because it is also logical law

from both a theoretical and philosophical viewpoint and insofar as the practical exigencies of business are concerned, it should not be upset. On the contrary, the prevailing rulings in general and the unanimous decision of the appellate court in this case should be allowed to stand. We respectfully submit that further review is unnecessary.

## CONCLUSION

**It is respectfully submitted that the dismissal of the complaint by the trial court and the affirmance of the appellate court were correct, and that the petition for a writ of certiorari should be denied.**

Respectfully submitted,

NOEL ARNOLD LEVIN
JEROME M. SCHWARTZ
JEROME H. RETTIG
267 Fifth Avenue
New York, N. Y. 10016

*Attorneys for Respondents*